UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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MICHAEL JAMES,

Petitioner,

REPORT AND
RECOMMENDATION

- against -

05-CV-1992 (BMC) (MDG)

LUIS R. MARSHALL, Superintendent of
Wallkill Correctional Facility,

Respondent.

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GO, United States Magistrate Judge:

Petitioner Michael James seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The petition in this matter was referred to me to report and recommend by the Honorable Nicholas G. Garaufis.[1] For the following reasons, I recommend that the petition be denied.

PROCEDURAL BACKGROUND

Michael James was charged with one count each of robbery in the first degree, N.Y. Penal Law § 160.15(3), robbery in the second degree, id. § 160.10(1), criminal possession of a weapon in the fourth degree, id. § 265.01(2), criminal possession of stolen property in the fifth degree, id. § 165.40, and menacing in the second degree, id. § 120.14(1). Following a jury trial

[1] The petition was subsequently reassigned to the Honorable Brian M. Cogan.

before the Honorable Jaime Rios, petitioner was convicted of both robbery counts, criminal possession of a weapon in the fourth degree and menacing in the second degree. On July 11, 2000, Justice Rios sentenced petitioner to concurrent terms of imprisonment of seven to fourteen years for each of the robbery convictions and one year each for the other two convictions. According to the New York Department of Correctional Services' website, petitioner was released on parole on April 11, 2007.[2]

Dunaway/Mapp/Huntley/Wade Hearing

Prior to trial, the Honorable Thomas A. Demakos conducted a hearing to determine the admissibility of, inter alia, testimony regarding the show-up and in-court identifications of petitioner and the knife seized from a car he was driving. Police Officers Carmine Antoniello and James O'Connor of the 110th Precinct in Queens testified.

On May 11, 1998, at approximately 11:05 p.m., while he was on routine patrol, Officer Antoniello received a radio transmission concerning a robbery in progress on 111th Street and 49th Avenue. Transcript of Dunaway/Mapp/Huntley/Wade Hearing held on June 3, 1999 ("Hearing Tr.") at 6, 22-23, 62. The radio report described the perpetrators as four male blacks in their late teens to early twenties, who fled the scene in a 1990's blue

[2] Although James has been released on parole, "he remains 'in custody' for habeas proceedings." Dixon v. Miller, 293 F.3d 74, 78 (2d Cir. 2002); see Mabry v. Johnson, 467 U.S. 504, 507 n.3 (1984).

Ford Taurus, with the license plate number "K363Z6." Id. at 7, 22-25, 27, 62, 66. Approximately twenty minutes later, as Officer Antoniello canvassed the area looking for the suspects, he spotted a vehicle traveling eastbound on Corona Avenue, about one mile from the scene of the crime. Id. at 8, 29, 33, 57. The car drew his attention because it was a blue Ford Taurus and the first three characters on its license plate were "K36." Id. at 8-9, 57. He also noticed that the driver appeared startled when he made eye contact with him. Id. at 9-10, 57. When Officer Antoniello pulled the car over, he saw that the full license plate number was "K363ZS." Id. at 10-11, 30, 56, 58.

There were three men in the car: petitioner in the driver's seat, co-defendant Dwayne Bryan in the front passenger seat and another man, Supreme Clark, in the back seat. Id. at 12-13. While his partner reported over the radio that they had stopped a vehicle and that the victim should be brought to the scene, Officer Antoniello ordered the three occupants of the vehicle to step outside of the car. Id. at 12, 14, 31-33, 36-38, 60.

Police Officer James O'Connor, who arrived at the car stop between 11:20 and 11:25 p.m., looked through the open front door of the passenger side of the vehicle and observed part of a knife blade and handle sticking out of the front passenger seat. Id. at 63-66, 68-70, 72. He retrieved the knife and handed it to Officer Antoniello. Id. at 64, 70.

Within five minutes of the radio call by Officer Antoniello's partner, the complaining witness, Robert Vargas,

arrived in a police van, which pulled up across the street. Id. at 14, 35, 38-39, 41, 45. At that time, the three suspects were standing at the rear of the blue Ford Taurus, with 10 to 12 police officers standing "right near them." Id. at 14, 16-17, 33, 35, 38-41, 45, 67. There were at least four or five police cars at the scene. Id. at 63, 67. Remaining in the van, Vargas told Officer Antoniello that four men had robbed him and that the three suspects had been involved in the robbery. Id. at 14-16, 22, 41-42, 45, 54-56. In response to the officer's question as to each suspect's role in the robbery, Vargas stated that petitioner wielded a knife and ordered him to give them money, while co-defendant Bryan, also holding a knife, took Vargas' money. Id. at 16, 55-56. Supreme Clark and another man stood in the background during the robbery. Id. at 16, 41-42, 54-55.

After Vargas' identification, the three suspects were placed under arrest. Id. at 16, 46. At the precinct, the arrestees were searched and $8 was recovered from co-defendant Bryan's pocket. Id. at 17. Petitioner asked Officer Antoniello why he was arrested. Id. at 18-19, 49-51. After Officer Antoniello replied that he was arrested for robbery, petitioner responded that they had been out looking for girls and did not rob anyone. Id. at 19, 49-51.

The hearing court denied the motions to suppress the knife and the identification, ruling that the police properly stopped the car because it matched the complaining witness' description and correctly brought the complaining witness to the scene to

confirm whether the suspects were involved in the robbery. Id. at 77. The court also found that the identification was proper and that the police had probable cause to arrest petitioner once the complaining witness identified the suspects as the men who robbed him. Id. at 78. The court further held that the knife was properly seized since it was in plain view and would have been recovered in any event pursuant to an inventory search of the vehicle. Id. at 78-79. The court did, however, suppress petitioner's statement because it was made without Miranda warnings. Id. at 79.

Evidence At Trial

After the first trial of petitioner and co-defendant Dwayne Bryan resulted in a hung jury, a second jury trial commenced on April 7, 2000. Besides Officers O'Connor and Antoniello, Robert Vargas also testified.

Robert Vargas testified that on May 11, 1998, at approximately 10:50 p.m., he was returning from night school to his home in Corona, Queens. Transcript of trial commenced on April 7, 2000 ("Tr.") at 689-92, 752-54. As he walked southward along 111th Street and neared the intersection of 49th Avenue, two African-American men approached him and demanded money. Id. at 692-93, 701, 740-41. He had first noticed the two men when they were about 20 feet in front of him. Id. at 693. One man was about 5'7" or 5'8" with some facial hair, while the other man was about six feet tall. Id. at 693-94, 727-28, 765. Vargas

identified the shorter man as petitioner and the taller man as co-defendant Bryan. Id. at 695. When petitioner came within an arm's length away from Vargas, petitioner pulled out a knife, while Bryan walked around to Vargas' side, slightly to the back. Id. at 694, 696-98. Two other African-American men stood on the corner of 49th Avenue, about 15 to 20 feet away. Id. at 701-02, 718, 722-23.

Although Vargas told the men that he had no money, petitioner felt Vargas' front pockets. Id. at 697, 742. As Vargas removed his wallet from his back pocket to show them that he had no money, Bryan grabbed the wallet and took out about $8. Id. at 698-700. Bryan tossed the wallet to Vargas after Vargas asked for his papers back. Id. at 700.

Vargas testified that the incident lasted three to five minutes, with petitioner standing in front of him holding a knife upward toward Vargas' face. Id. at 698-99, 703, 748-49. Vargas was nervous during the encounter and did not focus directly on the men because he was looking for an escape route and paying attention to the knife. Id. at 742-43, 745, 772, 803. Vargas estimated that the nearest street light was approximately 12 feet away, but the lighting "was pretty good." Id. at 693, 743.

Because the two men who robbed him and the two other men remained in front of him at the corner of 111th Street and 49th Avenue, Vargas crossed 111th Street to go home. Id. at 701-02, 746-47. After Vargas crossed 49th Avenue, he saw the men run from behind him west on 49th Avenue to get into a sky blue Ford

Taurus, parked about 15 feet from the corner where Vargas was. Id. at 703-05, 721-22. Vargas wrote down the license plate number of the car: "K363Z6." Id. at 705-06, 771-72, 802.

A few minutes later, Vargas called 911 and told the operator that he had been robbed at knife point by four black men in their late teens to early twenties, who fled in a 1993 or 1994 sky blue Ford Taurus, with the license plate number K363Z6. Id. at 687, 706-07, 723-25. The police arrived about 5 minutes later. Id. at 707. Vargas then rode around in a police van for 20 to 40 minutes looking for the suspects. Id. at 707, 739, 777.

At approximately 11:05 p.m., Officer Antoniello received a radio transmission that a robbery was in progress. Id. at 584. After first going to the scene of the crime, Officer Antoniello began canvassing the area for the suspects. Id. at 584-86, 613. At approximately 11:25 p.m., while traveling westbound on Corona Avenue, Officer Antoniello saw a blue Ford Taurus traveling eastbound on Corona Avenue, which had a license plate number beginning with "K36". Id. at 587-89. When he pulled the car over, he noticed that its license plate number was "K363ZS." Id. at 589-92. Petitioner was driving the car, co-defendant Bryan was riding in the front seat and Supreme Clark was sitting in the back. Id. at 590, 592-93. The three men in the car exited the vehicle at Officer Antoniello's request. Id. at 591-92. Officer Antoniello testified that petitioner had a beard and a mustache at the time. Id. at 670.

At approximately 11:20 p.m., Officer O'Connor went to the

car stop in response to a radio transmission that a car believed to be involved in a robbery was stopped at National Street and Corona Avenue. Id. at 559-60. As he looked inside the car through the open front passenger door, Officer O'Connor observed a knife in the front passenger seat, which he retrieved and gave to Officer Antoniello. Id. at 561, 594, 631.

Approximately 5 to 10 minutes later, Vargas arrived at the car stop in a police van. Id. at 593. The officers in the van with Vargas told him that "they thought they probably have the people who did it." Id. at 707-08, 777. Upon his arrival at the car stop, Vargas recognized the car as the one the robbers drove by its model and color. Id. at 708. Vargas told Officer Antoniello that he was surrounded by four men who robbed him, two of whom wielded knives.[3] Id. at 618-19, 657. Officer Antoniello pointed to the suspects and asked Vargas whether those were the men who robbed him and what role each man had played in the robbery. Id. at 603, 631. Vargas immediately identified petitioner as the shorter man, co-defendant Bryan as the taller man and Supreme Clark as one of the men standing on the corner. Id. at 592, 694-95, 708-09. Vargas, however, testified that he could not identify Supreme Clark by his face and did not see the two men on the corner well enough to describe them other than to

[3] Officer Antoniello testified that when he interviewed Vargas, Vargas told him that both of these men wielded knives and that he was "surrounded" by the four men. Id. at 618-619, 664-65, 667, 675-76. On cross-examination, Vargas denied saying that. Id. at 721, 763.

state they were black males. Id. at 701, 722-23, 781. When Officer Antoniello showed Vargas the knife seized from the car, Vargas identified it as the one used in the robbery. Id. at 641, 708, 710, 750. However, on cross-examination, Vargas admitted that he could not be certain that it was the same knife. Id. at 750.

Vargas made his identifications approximately 45 minutes after the robbery, while in the van, as the suspects stood about 20 to 30 feet away, surrounded by four to eight police officers. Id. at 572, 662-63, 707-08, 776, 780, 786, 788-89. Officer Antoniello testified that there was good lighting on the street from both the street lamps and the lights from the police cars, but that the nearest street light to the suspects was 30 to 40 feet away. Id. at 611-12, 629, 673; see also id. at 716.

At the precinct, Officer Antoniello recovered $35 from Bryan. Id. at 604, 607-08, 635-40, 787. While Officer Antoniello conceded that there was no way to know if the $8 in Bryan's possession was the same cash that was taken from Vargas, Vargas identified the cash as his money. Id. at 636-40, 787.

The jury convicted petitioner of all the counts, except for criminal possession of stolen property, and acquitted co-defendant Bryan of all charges.

Post-conviction History

On May 2, 2000, petitioner filed a motion to set aside the verdict on the grounds of juror misconduct, which Judge Rios

denied. See Petitioner's Motion to Set Aside the Verdict (annexed to Declaration of Michelle Maerov filed on April 19, 2007 ("4/19/07 Decl.") (ct. doc. 19) as Exh. B); Order dated July 7, 2000 denying motion to set aside the verdict (annexed to 4/19/07 Decl. as Exh. E). On August 2, 2000, petitioner filed a pro se motion to vacate his conviction on the grounds that the verdict was repugnant because his co-defendant was acquitted of all charges. See Petitioner's Motion to Vacate the Conviction (annexed to Declaration of Michelle Maerov filed on July 28, 2005 ("Maerov Decl.") (ct. doc. 10) as Exh. A). After Justice Rios denied the motion by order dated September 5, 2000, petitioner moved for leave to appeal the denial of his motion to the Appellate Division, Second Department. See Petitioner's Motion for Leave to Appeal (annexed to Maerov Decl. as Exh. C); Short Form Order (annexed to Maerov Decl. as Exh. B). On April 8, 2005, the Appellate Division denied petitioner's application for leave to appeal. See Decision & Order (annexed to Maerov Decl. as Exh. E).

In March 2002, petitioner, through counsel, directly appealed his conviction to the Appellate Division, Second Department, arguing that his guilt was not proven beyond a reasonable doubt and that his conviction was against the weight of the evidence. See Petitioner's Appellate Division Brief (annexed to Maerov Decl. as Exh. F). Petitioner also filed a pro se supplemental brief, claiming he was arrested without probable cause; the show-up identification was unduly suggestive; and the

verdict was repugnant. See Petitioner's Pro Se Supplemental Appellate Division Brief (annexed to Maerov Decl. as Exh. H).

On December 22, 2003, the Appellate Division affirmed petitioner's conviction. People v. James, 2 A.D.3d 751, 768 N.Y.S.2d 648 (2d Dep't 2003). The Appellate Division held that the evidence was "legally sufficient to establish [petitioner's] guilt beyond a reasonable doubt" and the verdict was not against the weight of the evidence. Id. at 648. The Appellate Division was "not persuaded that the showup identification procedure was unreasonable," finding that the show-up was "prompt and reliable," "in close spatial and temporal proximity to the scene of the crime" and "not unduly suggestive." Id. Justice McGinity dissented on this point, arguing that the "identification procedure was so unnecessarily suggestive as to create a substantial likelihood of misidentification requiring suppression." Id. at 650. Finally, the Appellate Division held that the petitioner's "remaining contentions, including those raised in his supplemental pro se brief, are without merit." Id. at 648. On March 5, 2004, the Court of Appeals denied petitioner's request for leave to appeal. People v. James, 2 N.Y.3d 741, 778 N.Y.S.2d 467 (2004).

On July 17, 2004, petitioner filed a pro se writ of error coram nobis alleging ineffective assistance of appellate counsel for failing to challenge the repugnant jury verdict which resulted in the acquittal of the co-defendant and conviction of petitioner; and the impropriety of the show-up identification

procedure. See Petitioner's Motion for a Writ of Error Coram Nobis (annexed to Maerov Decl. as Exh. N). On November 1, 2004, the Appellate Division denied petitioner's application. People v. James, 12 A.D.3d 380, 783 N.Y.S.2d 299 (2d Dep't 2004).

On March 28, 2005, petitioner filed a pro se habeas petition in the Western District of New York raising the following claims:

1. The verdict was repugnant because petitioner's co-defendant was acquitted;
2. The verdict was legally insufficient and against the weight of the evidence;
3. Petitioner was arrested without probable cause; and
4. The show-up identification was unduly suggestive.

See Petition for Writ of Habeas Corpus ("Petition") (ct. doc. 5-2). On April 4, 2005, this action was transferred to the Eastern District of New York. See ct. doc. 5-5.

DISCUSSION

I. Applicable Law for Habeas Review

The writ of habeas corpus is available to any person held "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Since this petition was filed after the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), the provisions of AEDPA govern to the extent applicable. See Williams v. Taylor, 529 U.S. 362, 402-03 (2000); Boyette v. Lefevre, 246 F.3d 76, 88 (2d Cir. 2001).

A. Standard of Review

AEDPA created a new standard of review intended to "place[]

a new restriction on the power of federal courts to grant writs of habeas corpus to state prisoners." Williams, 529 U.S. at 399. A court reviewing a habeas petition under AEDPA may not grant a writ "with respect to any claim that was adjudicated on the merits in State court proceedings unless" the state court decision was either (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

The two clauses of subsection (1) have "independent meaning." Williams, 529 U.S. at 364. Under the first clause, a state court decision will be considered "contrary to" federal law if it either "applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases" or "confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [Supreme Court] precedent." Williams, 529 U.S. at 405-06 (O'Connor, J., concurring).

Under the second clause, habeas relief may be granted if the state court decision "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case." Williams, 529 U.S. at 407-08. Whether a state decision is an "unreasonable application" of federal law must be based on an objective standard and relief may not be granted unless a relevant state court decision is both erroneous and

unreasonable. Id. at 409, 411. "An unreasonable application of federal law is more than an incorrect application, but the petitioner need not show that all reasonable jurists would agree that a state court determination is incorrect in order for it to be unreasonable." Yung v. Walker, 296 F.3d 129, 135 (2d Cir. 2002).

In reviewing findings of fact under AEDPA, federal courts must assess whether the state court's determination was based on "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). Under this standard, a state court's determinations of fact shall be "presumed to be correct," and the habeas petitioner "shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

A state court need not set forth the legal basis for resolution of federal claims in order for the broadly deferential standard set out in AEDPA to apply. See Sellan v. Kuhlman, 261 F.3d 303, 311-12 (2d Cir. 2001). Rather:

> [T]he plain meaning of § 2254(d)(1) dictates [that for] the purposes of AEDPA deference, a state court 'adjudicate[s]' a state prisoner's federal claim on the merits when it (1) disposes of the claim 'on the merits,' and (2) reduces its disposition to judgment. When a state court does so, a federal habeas court must defer in the manner prescribed by 28 U.S.C. § 2254(d)(1) to the state court's decision on the federal claim -- even if the state court does not explicitly refer to either the federal claim or to relevant federal case law.

Id. at 312.

B. Procedural Requirements

Prior to bringing a petition for habeas corpus pursuant to 28 U.S.C. § 2254, a petitioner must exhaust the remedies available in state court or demonstrate that "there is an absence of available State corrective process [or] [that] circumstances exist that render such process ineffective to protect the rights of the applicant." 28 U.S.C. § 2254(b); see Keeney v. Tamayo-Reyes, 504 U.S. 1, 9-10 (1992); Rose v. Lundy, 455 U.S. 509 (1982); DiSimone v. Phillips, 461 F.3d 181, 190 (2d Cir. 2006). The exhaustion requirement is based upon the principle of "comity," or respect for states, by giving states the first opportunity to pass upon convictions rendered in their courts. See Duncan v. Henry, 513 U.S. 364, 365-66 (1995); Duckworth v. Serrano, 454 U.S. 1 (1981); Ellman v. Davis, 42 F.3d 144, 147 (2d Cir. 1994).

In order to exhaust claims, petitioners must "fairly present" their constitutional claims to the highest state court. See Picard v. Connor, 404 U.S. 270, 275 (1971); Fama v. Comm'r of Corr. Servs., 235 F.3d 804, 808 (2d Cir. 2000); Daye v. Attorney General of the State of New York, 696 F.2d 186, 194 (2d Cir. 1982) (en banc). In other words, the claims presented by a petitioner to the State appellate courts must be the "substantial equivalent" of the claims he raises in the federal habeas petition. Picard, 404 U.S. at 278. A petitioner may satisfy this fair presentation requirement by (a) reliance on pertinent federal cases employing constitutional analysis, (b) reliance on

state cases employing constitutional analysis in like fact situations, (c) assertion of a claim in terms so particular as to call to mind a specific right protected by the Constitution, or (d) alleging a pattern of facts that is well within the mainstream of constitutional litigation. Daye, 696 F.2d at 194; see also Jimenez v. Walker, 458 F.3d 130, 149 (2d Cir. 2006).

II. Inconsistency of Verdicts

Petitioner argues that his Fourteenth Amendment rights were violated because he was convicted of robbery in the second degree under the theory of being aided by another person actually present, while his co-defendant was acquitted of all charges. See Petition at ¶ 12(A). Petitioner raised this claim in his pro se motion to vacate his conviction and his pro se supplemental brief on direct appeal, both of which were denied on the merits. See Maerov Decl., Exhs. A, B, H; James, 768 N.Y.S.2d at 648.

Respondent argues that petitioner did not exhaust this claim in state court because he argued on direct appeal only that the verdict violated state law, rather than the United States Constitution. See Resp.'s Mem. of Law in Opp. at 11 (ct. doc. 10-2). Respondent concedes, however, that petitioner cited the Fifth and Fourteenth Amendments in his letter to the Court of Appeals seeking leave to appeal. Id.; Petitioner's Leave Application to the Court of Appeals at 2 (annexed to Maerov Decl. as Exh. K). Although respondent is correct that a claim is not "fairly presented" where it is raised for "the first and only

time" in an application for discretionary review in the Court of Appeals, see Castille v. Peoples, 489 U.S. 346, 351 (1989) (cited by respondent), the claims that petitioner raised in his letter to the Court of Appeals are identical to the claims in his pro se brief on direct appeal to the Appellate Division, except for the addition of the reference to the Fifth and Fourteenth Amendments. By raising this claim on direct appeal and then expressly raising the federal nature of the claim to the Court of Appeals,[4] petitioner has "fairly presented" his claim to the highest court of the state. See Porter v. Greiner, No. CV 00-6047, 2005 WL 3344828, at *14 n.15, *15 (E.D.N.Y. Nov. 18, 2005) (distinguishing Castille); Salcedo v. Artuz, 107 F. Supp. 2d 405, 415 (S.D.N.Y. 2000) ("Merely mentioning a constitutional amendment in a point heading fairly presents the constitutional claim to state courts.").

Turning to the merits of the claim, inconsistency in verdicts is not a ground for habeas relief even with respect to verdicts that treat co-defendants in a joint trial inconsistently. See Harris v. Rivera, 454 U.S. 339, 345 (1981); see also United States v. Powell, 469 U.S. 57, 63-65 (1984); United States v. Acosta, 17 F.3d 538, 545 (2d Cir. 1994); Estrada

[4] Petitioner may have failed to preserve this claim for appellate review by not raising it with the trial court prior to the jury's discharge. See People v. Granston, 259 A.D.2d 760, 688 N.Y.S.2d 172, 173 (2d Dep't 1999). Nevertheless, since the Appellate Division denied petitioner's claim on the merits rather than relying on this "adequate and independent" state procedural default, there is no procedural bar to habeas review. See Harris v. Reed, 489 U.S. 255, 261-62 (1989).

v. Senkowski, No. 98 CIV. 7796, 1999 WL 1051107, at *13-*14 (S.D.N.Y. Aug. 16, 1999). In Powell, the Supreme Court explained:

> [W]here truly inconsistent verdicts have been reached, '[t]he most that can be said . . . is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt.' . . . It is equally possible that the jury, convinced of guilt, properly reached its conclusion . . . then through mistake, compromise, or lenity, arrived at an inconsistent conclusion, on the [other] offense.

469 U.S. at 64-65 (quoting Dunn v. United States, 284 U.S. 390, 393 (1932)). The criminal defendant's protection against irrational verdicts is the courts' review of the sufficiency of the evidence, which entails review of each count independently. See Powell, 469 U.S. at 67; Harris, 454 U.S. at 344; Acosta, 17 F.3d at 545.

In any event, the verdicts are not necessarily inconsistent. The jury was specifically instructed "to decide separately with respect to each defendant whether or not" their guilt had been proven beyond a reasonable doubt and that "the verdict doesn't have to be the same for each defendant." Tr. at 896-97. In following this instruction, the jury may have credited Vargas' identification of petitioner but not his identification of Bryan, who stood behind the victim during the robbery.

For the foregoing reasons, the state courts' decisions were neither contrary to, nor an unreasonable application of, clearly established federal law.

III. Probable Cause to Arrest

Petitioner claims that the police lacked probable cause to arrest him and all evidence seized should have been suppressed as the fruits of the illegal arrest. See Petition at ¶ 12(C). Specifically, petitioner argues that Vargas had reported being robbed by four men, while petitioner was traveling with only two men in a car with a license plate that did not match the one described by Vargas. See id. The hearing court denied petitioner's suppression motion after an evidentiary hearing and the Appellate Division rejected this claim on the merits.

As respondent correctly argues, this claim is not cognizable on federal habeas review under the doctrine articulated by Stone v. Powell, 428 U.S. 465 (1976). Under Stone, a habeas petitioner is not entitled to relief for a Fourth Amendment claim "where the State has provided an opportunity for full and fair litigation." Id. at 482. Accordingly, a habeas petitioner's Fourth Amendment claims may be reviewed only "(a) if the state has provided no corrective procedures at all to redress the alleged fourth amendment violations; or (b) if the state has provided a corrective mechanism, but the defendant was precluded from using that mechanism because of an unconscionable breakdown in the underlying process." Capellan v. Riley, 975 F.2d 67, 70 (2d Cir. 1992). Here, not only did New York provide a corrective procedure to redress petitioner's Fourth Amendment claim in the form of a suppression hearing, petitioner employed that mechanism by litigating his Fourth Amendment claim at the pretrial hearing

and on direct appeal to the Second Department. Petitioner's disagreement with the outcome of his motion does not provide a basis for habeas review. See id. at 71-72. In any event, as discussed below, the police had probable cause to arrest petitioner after stopping the blue Taurus he was driving and recovering the knife.

IV. Suggestiveness of Show-up

Petitioner argues that his show-up identification was unduly suggestive, pointing to the fact that Vargas identified him from a distance of 43 feet while petitioner was surrounded by 10 to 12 police officers. See Petition at ¶ 12(D). The hearing court denied petitioner's motion to suppress the identification,[5] which the Appellate Division affirmed in a 2-to-1 decision, holding that the identification procedure used was "prompt and reliable" and "in close spatial and temporal proximity to the scene of the crime." James, 768 N.Y.S.2d at 648.

Due process requires the exclusion of identification testimony which is so unreliable as to create "a very substantial likelihood of irreparable misidentification." Manson v. Brathwaite, 432 U.S. 98, 116 (1977). To be admissible, the court must find either that the identification procedures were not unduly suggestive or that the identification was independently

[5] The hearing court did not discuss the circumstances surrounding the identification beyond stating that "when the complainant was brought over, he said those are the individuals that robbed me." H. Tr. at 78.

reliable despite any unnecessarily suggestive procedure. See Manson, 432 U.S. at 114; Neil v. Biggers, 409 U.S. 188, 199 (1972); Raheem v. Kelly, 257 F.3d 122, 133 (2d Cir. 2001). If the identification procedure is found to be unduly suggestive, the court must consider whether there is an independent basis for finding that the identification is reliable by considering five factors: (1) the opportunity of the witness to view the suspect at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the suspect; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation. See Manson, 432 U.S. at 110-14; Biggers, 409 U.S. at 199. In determining whether a show-up is unduly suggestive or whether an identification is independently reliable, the facts must be considered "in light of the totality of the circumstances." Manson, 432 U.S. at 113-14; Neil, 409 U.S. at 199-200; United States v. Mohammed, 27 F.3d 815, 821 (2d Cir. 1994); United States v. Concepcion, 983 F.2d 369, 377-78 (2d Cir. 1992).

The Supreme Court has recognized that "the practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned." Stovall v. Denno, 388 U.S. 293, 302 (1967). Such identification procedures are by their nature, "inherently suggestive." Brodnicki v. City of Omaha, 75 F.3d 1261, 1265 (9th Cir. 1996); Francischelli v. Potter, No. 03-CV-6091, 2007 WL

776760, at *5 (E.D.N.Y. March 12, 2007); Brisco v. Phillips, 376 F. Supp. 2d 306, 313 (E.D.N.Y. 2005). On the other hand, as the Second Circuit has noted, "it is now settled law that prompt on-the-scene confrontation is 'consistent with good police work' and does not offend the principles established in United States v. Wade." United States ex rel. Cummings v. Zelker, 455 F.2d 714, 716 (2d Cir. 1972) (quoting United States v. Sanchez, 422 F.2d 1198, 1200 (2d Cir. 1970)). In contrast to station house line-ups, "prompt confrontation [is] desirable because it serve[s] to insure 'the immediate release of an innocent suspect and at the same time [to] enable the police to resume the search for the fleeing culprit while the trail is fresh.'" Id. In fact, the Second Circuit has instructed the police to "'make immediate reasonable efforts to confirm the suspect's identity.'" United States v. Bautista, 23 F.3d 726, 729-30 (2d Cir. 1994) (quoting United States v. Valez, 796 F.2d 24, 27 (2d Cir. 1986)).

Due to the police's interest in quickly exonerating a suspect, courts generally permit show-ups that are conducted in close temporal and geographic proximity to the crime. See Francischelli, 2007 WL 776760, at *6; Bratcher v. McCray, 419 F. Supp. 2d 352, 358 (W.D.N.Y. 2006); Brisco, 376 F. Supp. 2d at 313. Here, the show-up identification took place approximately 45 minutes after the robbery and approximately one mile from where the robbery occurred. Tr. at 673, 707-08.[6]

[6] In reviewing a suppression ruling, the Court may consider (continued...)

However, several factors added to the suggestiveness inherent in the show-up procedure. Prior to his viewing of the suspects, police officers told Vargas that they thought they probably had the people who robbed him. Such "unnecessary words or actions that aggravate the inherent suggestiveness of a showup may render it inadmissible." Brisco, 376 F. Supp. 2d at 313; see Mohammed, 27 F.3d at 821 (finding show-up suggestive where officer told witness "that they had arrested the person they believed to be the carjacker"); Styers v. Smith, 659 F.2d 293, 297 (2d Cir. 1981) ("notification to a witness that a suspect has been picked up . . . may be dangerously suggestive when combined with a show-up rather than a fair line-up"); Bratcher, 419 F. Supp. 2d at 359 (witness blurting out "that's him" in front of other witnesses added to the show-up's suggestiveness).

Vargas identified petitioner while in a police van across the four-lane wide street.[7] Petitioner and the two other

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[6](...continued)
the evidence adduced at trial in addition to that presented at the pre-trial hearing. See United States v. $557,933.89, More or Less, in U.S. Funds, 287 F.3d 66, 83 (2d Cir. 2002); United States v. Canieso, 470 F.2d 1224, 1226 (2d Cir. 1972).

[7] Testimony regarding the distance between Vargas and the suspects during the show-up varied from 43 feet to 20 feet. At the pre-trial hearing, Justice Demakos estimated that the distance was 43 feet based on where Officer Antoniello pointed to for reference in the courtroom. Hearing Tr. at 45. At trial, Officer Antoniello estimated the distance was 20-30 feet. Tr. at 662. Officer O'Connor testified that the distance was 30 feet. Id. at 572. Although at the first trial, Vargas testified that the distance was 30 feet, he testified at the second trial that he identified the suspects from 20 feet away. Id. at 572, 776, 780, 788-89. What is undisputed is that the van in which Vargas
(continued...)

suspects stood by the sky blue Taurus that Vargas immediately recognized by its model and color when he first arrived at the scene. Vargas' identification of the petitioner may have been affected by the proximity of the blue Taurus. See Raheem, 257 F.3d at 135-37 (holding that line-up was unnecessarily suggestive where petitioner was only participant wearing black leather coat which featured prominently in witnesses' descriptions of the shooter); Wray v. Johnson, 202 F.3d 515, 524 (2d Cir. 2000) (holding that the show-up identification of a suspect matching the description of having a black hat and long black coat while in a jail cell was improperly suggestive); Bratcher, 419 F. Supp. 2d at 359 (petitioner wearing "distinctive green-and-white sneakers" that matched witnesses' description to police added to suggestiveness of show-up); Brisco, 376 F. Supp. 2d at 315 (noting that suggestiveness of show-up increased where police made the suspect hold up a wet pair of maroon shorts that fit the "distinctive description of the perpetrator's clothing" given by the victim). Finally, during the identification procedure, there were at least 8 police officers[8] around petitioner and two other

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[7](...continued)
sat and the blue Taurus behind which the suspects stood were stopped on opposite sides of a street that was four-lanes wide in total.

[8] At trial, Officer Antoniello testified that there were 10 to 12 officers at the scene, with 4 to 8 officers surrounding the suspects. Tr. at 662-63; see also H. Tr. at 39-41 (10 to 12 officers stood "right near" the suspects). Vargas testified that he saw 8 officers at the scene. Tr. at 786.

suspects and 4 to 5 police cars at the stop.[9] See Bratcher, 419 F. Supp. 2d at 359 (petitioner was flanked by two uniformed police officers who had him exit the marked police car and walk toward the bank); Brisco, 376 F. Supp. 2d at 315 (finding show-up "highly suggestive" where petitioner was shown to the victim surrounded by three uniformed policemen and two marked and one unmarked police vehicles with no other individuals in the immediate area other than uniformed police officers).[10]

In sum, under the totality of the circumstances, I find the show-up procedure impermissibly suggestive since both the officers' pointed statement and the procedures used effectively "sa[id] to the witness 'This is the man.'" See Foster v. California, 394 U.S. 440, 443 (1969) (quoting Biggers v. Tennessee, 390 U.S. 404, 407 (1968)). While slightly different circumstances might have justified the use of the show-up identification procedure, no exigencies were present here. Given that the suspects' car so closely matched Vargas' description,

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[9] While the Appellate Division noted that the presence of so many officers was explained by the number of suspects being detained, see James, 768 N.Y.S.2d at 648, this factor, nonetheless, added to the already suggestive nature of the identification procedure.

[10] But see Torrez v. Sabourin, No. 00 Civ. 3286, 2001 U.S. Dist. LEXIS 5265, at *14-*16 (S.D.N.Y. April 19, 2001) (show-up identification while petitioner was on his hands and knees surrounded by police officers and patrol cars was not unduly suggestive); United States v. Ortiz, No. 99 Cr. 532, 2000 U.S. Dist. LEXIS 322, at *2-*3 (S.D.N.Y. Jan. 13, 2000) (show-up identification while defendants were in handcuffs, standing beside a marked police car, and accompanied by uniformed police officers was not unnecessarily suggestive).

the suspects' temporal and geographic proximity to the crime and the police's recovery of the knife before the victim arrived at the show-up, the police had sufficient evidence to arrest the suspects and conduct a line-up at the station house. See Brisco, 376 F. Supp. 2d at 314-15 ("it appears that the police could have easily constructed a less suggestive lineup at the police station within a short period of time rather than conducting a showup").

Irrespective of whether the show-up procedure was unduly suggestive and unnecessary, due process is satisfied so long as the identification is independently reliable. Reliability in this context means that "the witness's recollection was undistorted." Raheem, 257 F.3d at 140.

In assessing reliability under the Biggers factors, no one factor is dispositive. See Mohammed, 27 F.3d at 821. First, Vargas observed petitioner approach from 20 feet away before the robbery. Next, Vargas had ample opportunity to view petitioner during the robbery, which lasted between three and five minutes, while petitioner stood directly in front of him about an arm's length away. See United States v. Wong, 40 F.3d 1347, 1360 (2d Cir. 1994) (looking at defendant's face for 2-3 seconds "was sufficient for identification" to be independently reliable); Mendoza v. McGinnis, 03 Civ. 2598, 2004 WL 736894, at *7 (S.D.N.Y. April 5, 2004) (finding identification sufficiently reliable where witness spoke to petitioner "face-to-face, while standing approximately three feet away for several minutes"). After the robbery, Vargas observed the perpetrators from across

the street and then as they ran towards the car to make their escape. Although the robbery occurred at night, the streetlights nearby provided "pretty good" light. Vargas also had 20/20 vision. Tr. at 705.

As to the second factor, Vargas testified that he was focused on the knife and looked beyond the robbers for an escape route. That his attention would be directed toward the knife rather than petitioner's face is understandable. See Raheem, 257 F.3d at 138 ("[I]t is human nature for a person toward whom a [weapon] is being pointed to focus his attention more on the [weapon] than on the face of the person pointing it"); Smith v. Smith, No. 02 Civ. 7308, 2003 WL 22290984, at *11 (S.D.N.Y. Sept. 29, 2003) ("Studies have indicated that a crime witness' attention will often be highly focused on the weapon being used in the crime (the barrel of a gun or the blade of a knife), resulting in a reduction in ability of the witness to remember other details of the crime (including the face of the assailant)"); Kennaugh v. Miller, 150 F. Supp. 2d 421, 435 (E.D.N.Y. 2001) (finding that degree of witness' attention did not support independent reliability of identification because witness had gun pointed at her throughout the time that she viewed perpetrator). Vargas also testified that he was agitated and nervous during the robbery. However, his fear may have enhanced his observations of the robbers. See Vasquez v. Poole, 331 F. Supp. 2d 145, 159 (E.D.N.Y. 2004) ("[The victim's] ability to focus may have been adversely affected by the fact that she

was terrified . . . but that same fact may have served to sharpen her attention"); Edwards v. Fischer, No. 00 Civ. 7929, 2002 WL 1225538, at *5 (S.D.N.Y. June 5, 2002) (that witness observed the robbers "with attentive fear as they threatened him with a gun" supported the reliability of the identification).

Third, while the evidence at the second trial indicated that Vargas did not describe any physical detail of the perpetrators other than their race and approximate age in his call to 911,[11] "the absence of a prior description by the witness does not necessarily render his or her subsequent identification suspect." Mohammed, 27 F.3d 815; Concepcion, 983 F.2d at 377-78. In fact, Vargas testified he observed that petitioner had facial hair and braided hair and was approximately 5'7" or 5'8".[12] Tr. at 733-36, 765. Finally, the show-up was conducted while Vargas' memory was fresh, only forty-five minutes after the robbery. Indeed, Vargas immediately identified petitioner. Id. at 603.

After balancing the relevant factors, I find that Vargas' identification of petitioner was sufficiently reliable so as to

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[11] Both parties stipulated to the fact that Vargas gave this description to the 911 operator. Id. at 687. However, on cross-examination, Vargas admitted that he testified in an earlier proceeding (the first trial) that he gave the 911 operator a more detailed description of the defendants. Id. at 725-27. Nonetheless, Vargas denied that he told the 911 operator that the shorter of the two men that approached him had a "like Latrell Sprewell look" and was not clean shaven and the taller man had a "baby face." Id. at 725-27, 778-79.

[12] Corroborating this, Officer Antoniello testified that petitioner was 5'7" and had a goatee or beard and a moustache at the time of his arrest. Tr. at 620-23, 670.

outweigh the suggestiveness of the show-up. He had sufficient opportunity to observe and, in fact, did remember petitioner's physical characteristics and features, notwithstanding the threatening circumstances of the encounter. Therefore, because the findings of reliability made by the state courts were not contrary to, nor involved an unreasonable application of, clearly established federal law, nor based on an unreasonable determination of the facts, I recommend that petitioner's claim be denied.

V. Weight and Sufficiency of the Evidence

Petitioner claims that (1) there was insufficient evidence at trial to prove his guilt beyond a reasonable doubt, and (2) the verdict was against the weight of the evidence. See Petition at ¶ 12(B). The Appellate Division rejected both claims on the merits. See James, 768 N.Y.S.2d at 648.

It is well established that a weight of the evidence claim is grounded in N.Y. Crim. Proc. Law § 470.15 and thus is unreviewable in a habeas proceeding for not presenting a federal constitutional issue. See Fils-Amie v. Fischer, No. 03 Civ. 939, 2007 WL 117777, at *4 (S.D.N.Y. Jan. 16, 2007); Santana v. Poole, No. CV-03-3946, 2006 WL 3483923, at *9 (E.D.N.Y. Nov. 30, 2006); see also Ex Parte Craig, 282 F. 138, 148 (2d Cir. 1922).

Although a sufficiency of the evidence claim is subject to habeas review, a petitioner "bears a very heavy burden" when challenging a state criminal conviction. Einaugler v. Supreme

Court of State of N.Y., 109 F.3d 836, 840 (2d Cir. 1997); Diaz v. Greiner, 110 F. Supp. 2d 225, 233 (S.D.N.Y. 2000). A habeas court may not grant relief on such a claim unless the record is "so totally devoid of evidentiary support that a due process issue is raised." Bossett, 41 F.3d at 830. Where a petitioner claims that his guilt was not proven beyond a reasonable doubt, the relevant question for the court is whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319 (1979). The Court will "view the evidence in the light most favorable to the government," "construe all permissible inferences in its favor," and "resolve all issues of credibility in favor of the jury's verdict." United States v. Reyes, 157 F.3d 949, 955 (2d Cir. 1998) (internal citations and quotation marks omitted); see also Jackson, 443 U.S. at 319; Maldonado v. Scully, 86 F.3d 32, 35 (2d Cir. 1996).

When evaluating a sufficiency of the evidence claim, a federal court must look to state law to define the elements of the crime. Jackson, 443 U.S. at 324; Quartararo v. Hamslmaier, 186 F.3d 91, 97 (2d Cir. 1997). A person is guilty of robbery in the first degree when he forcibly steals property and when, in the course of the commission of the crime, he or another participant in the crime uses or threatens the immediate use of a dangerous instrument. N.Y. Penal Law § 160.15[3]. A person is guilty of robbery in the second degree when he forcibly steals property and when he is aided by another person actually present.

N.Y. Penal Law § 160.10[1]. A person is guilty of criminal possession of a weapon in the fourth degree when he possesses a weapon with intent to use the same unlawfully against another. N.Y. Penal Law § 265.01[2]. A person is guilty of menacing in the second degree when he intentionally places another person in reasonable fear of physical injury by displaying a deadly weapon. N.Y. Penal Law § 120.14[1].

"[T]he testimony of a single, uncorroborated eyewitness is generally sufficient to support a conviction." Edwards v. Jones, 720 F.2d 751, 755 (2d Cir. 1983); United States v. Danzey, 594 F.2d 905, 916 (2d Cir. 1979). Here, Vargas' testimony at trial demonstrated that petitioner stole money from him at knife point with the help of three other men, two of whom blocked Vargas from escaping and one of whom took money out of Vargas' wallet. The four men fled in a sky blue Ford Taurus which was stopped by the police about 30 minutes later and from which the police recovered a knife. The car stopped by police was driven by petitioner and matched the description Vargas provided to the 911 operator, including five of the six characters of the license plate. About 45 minutes after the robbery, Vargas identified petitioner as the robber wielding the knife and identified the knife recovered from the car as the one used to threaten him. Vargas also identified petitioner in court.

Petitioner's legal sufficiency claim is entirely based on an attack of Vargas' credibility as the sole eyewitness. However, "assessments of the weight of the evidence or the credibility of

witnesses are for the jury and not grounds for" habeas relief. Maldonado, 86 F.3d at 35; Bossett, 41 F.3d at 830 ("The jury is exclusively responsible for determining a witness' credibility"). The jury clearly credited Vargas' testimony that petitioner was the perpetrator and it was reasonable for the jury to so find, notwithstanding some inconsistency between Vargas' testimony and Officer Antoniello's testimony regarding what Vargas told him. Because the evidence was sufficient to support petitioner's conviction beyond a reasonable doubt, the Appellate Division's decision was neither contrary to, nor involved an unreasonable application of, clearly established federal law.

CONCLUSION

For the foregoing reasons, I recommend that this Court deny Michael James' petition for a writ of habeas corpus. As petitioner has not made a substantial showing of the denial of a constitutional right, I further recommend that this Court deny any application by petitioner for a certificate of appealability. See Soto v. United States, 185 F.3d 48, 51 n.3 (2d Cir. 1999) (district court may issue certificate).

This report and recommendation will be electronically filed and sent via overnight mail to the petitioner on this date. Any objections to this Report and Recommendation must be filed, with a courtesy copy sent to Judge Cogan and the undersigned, by October 16, 2007. Failure to file objections within the

specified time waives the right to appeal. See 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b).

SO ORDERED.

Dated: Brooklyn, New York
September 28, 2007

/s/
MARILYN DOLAN GO
UNITED STATES MAGISTRATE JUDGE

Copy to:

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